

WEST VIRGINIA'S ENVIRONMENTAL GOOD SAMARITAN ACT

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Introduction

Since the early 1990's, the West Virginia Department of Environmental Protection (WVDEP) has been involved in the design and construction of passive acid mine drainage (AMD) treatment systems. Through the years, several approaches have been utilized to address the landrights necessary to construct these systems on private property.

In the early years, we initially used our standard right of entry agreements. However, as these treatment systems increased in size and complexity, landowners quickly began asking for protection due to their concern for liability. These liability concerns were many faceted and included personal injury or damages by third parties; accumulation of metals in the treatment cells; responsibility for operation and maintenance of the system; effluent from the system; renewed low quality discharges if the system eventually failed; renewed low quality discharges after the service life of the system; and, responsibility should the state's AML program be discontinued.

These concerns led to the inclusion of several special provisions in the right of entry agreements intended to placate landowner's concerns. However, even with these provisions, convincing landowners to sacrifice land for water treatment continued to be a difficult task. Many found the provisions to be lacking and were requesting outright indemnification. However, in West Virginia, state agencies are prohibited from indemnifying and holding any party harmless.

On the other side of the equation, we as the WVDEP, were also not satisfied with the right of entry agreements being used. These agreements did not grant the WVDEP perpetual (life of the treatment system) rights to operate, maintain, repair, monitor and access the treatment systems. Neither did they prohibit the landowners from disturbing or removing these systems. This was very

troublesome considering the costs involved in constructing these treatment systems and the possibility of the land being sold to an uncooperative landowner.

In the late 1990's, all of this led to a reevaluation of our procedures for the handling of landrights on AML projects with passive water treatment systems. It was decided that we needed to obtain legal control of these systems and we needed to resolve landowner liability concerns.

To obtain the legal long-term control of future treatment sites, the WVDEP considered both the outright purchase of sites and the use of easements. The use of easements was settled upon after considering many factors the most compelling of which was the state's complex and time consuming policies and procedures for land purchases. Landowner liability concerns were addressed as follows.

Environmental Good Samaritan Act

In 2005, after a couple of years working on legislation to address civil and environmental liability concerns and encourage voluntary reclamation, the WV Legislature passed the Environmental Good Samaritan Act (EGSA). The EGSA (WV Code Chapter 22, Article 27) provided protections and immunities to landowners and project sponsors involved in reclamation projects.

The protections and immunities provided to Landowners can be summarized as follows:

- Liability for injury or damages resulting from treatment facilities constructed during the project
- Liability for injury or damages by third parties during implementation of the project
- Liability for injury or damages by third parties resulting from the project
- Liability for any pollution resulting from the project
- Liability for the operation, maintenance or repair of treatment facilities constructed during the project

The protection and immunities provided to Project Sponsors can be summarized as follows:

- Liability for injury or damages resulting from treatment facilities constructed during the project
- Liability for pollution emanating from treatment facilities constructed during the project
- Liability for the operation, maintenance and repair of treatment facilities constructed during the project

Eligibility

To be eligible for protection under the EGSA, landowners must provide access to or use of property at no cost for a reclamation project. Project Sponsor eligibility requires a person to provide equipment, materials or services at no cost or at cost for a reclamation project. Property eligible under the act is land or water adversely affected by mineral extraction and for which no person has a continuing reclamation or water pollution abatement obligation.

Application & Implementation

After meeting eligibility requirements, a Landowner or Project Sponsor must submit an application to the WVDEP. Information required in the application includes such items as project objective, location and participants; a detailed written project plan; property identification; and the names and addresses of adjacent landowners and downstream riparian owners.

In addition to providing public notice of the project, the WVDEP must then provide written notice to the adjacent landowners and downstream riparian owners and accept written comments.

After receipt of a letter of approval from the WVDEP, a landowner and/or project sponsor is immune from civil liability and may raise the protections afforded by the EGSA in any subsequent legal proceeding brought to enforce environmental laws or otherwise impose liability.

Exceptions to Immunity

Nothing in the EGSA may limit a landowner's or project sponsor's liability that results from a reclamation project or water pollution abatement project if any of the following apply:

- For injury or damage resulting from the landowner's or project sponsor's acts or omissions which are reckless or constitute gross negligence or willful misconduct.
- Where the landowner accepts or requires consideration for allowing access to implement a project or to operate, maintain or repair a water pollution abatement project.
- For the landowner's or project sponsor's unlawful activities.
- For damage to adjacent or downstream riparian landowners which results from a project where written notice or public notice of the project was not provided.

Conclusion

The EGSA has made a real difference in the WVDEP's ability to convince landowners to participate in water pollution abatement projects. And the acquisition of easements instead of rights of entry has given the WVDEP the needed ownership and control of treatment systems. Together, these actions have resolved many of the concerns that had been a real hindrance to the construction, operation and maintenance of AMD treatment facilities.

Even with these advances, realty problems still remain with landowners being concerned with the loss of land use, the loss of timber, taxes on unusable land, negative impacts on property marketability, aesthetics, etc. Nevertheless, while these problems are not minor, they are a fact of everyday life for realty agents and something they have the expertise to handle.

The EGSA has resolved the most cumbersome of realty issues and the benefits it affords the WV AML Program will go a long way in encouraging and enabling the construction of treatment facilities to abate the many AMD problems affecting state waters.